IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

APR 7 1989

LYNN L. BREININGER,

Petitioner,

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 6,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief *amicus curiae* in support of the petitioner.

INTEREST OF *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation is a nonprofit charitable organization that exists to

provide free legal assistance to individual employees whose rights are being denied or who are suffering discrimination in employment as a result of compulsory unionism arrangements. It is the purpose of the Foundation to aid such individuals in protecting the rights guaranteed to them under federal and state law; they seldom are able, without assistance, to defend their rights against labor organizations, which have abundant legal talent and resources at their disposal.

The Foundation has a vital interest in the crucial questions addressed by the present case. These questions involve employee right of access to federal district courts to remedy union violations of the duty of fair representation, and a union's ability to "discipline" union dissidents through a discriminatory job referral program.

For the foregoing reasons, the National Right to Work Legal Defense Foundation requests that this motion be granted and that the annexed brief be accepted for filing.[1]

Respectfully submitted,

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[1] In accordance with the Court's rules, the undersigned sought consent of the parties to the filing of this brief *amicus curiae*. Although petitioner consented to the filing, respondent union chose to withhold consent. *Amicus curiae* regrets to have to use this Court's valuable time to request leave to file this brief *amicus curiae*, but is left with no alternative in light of respondent's unwillingness to consent.

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BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, IN SUPPORT OF PETITIONER

Pursuant to a motion for leave to file under Rule 36.1 of the Rules of this Court, the National Right to Work Legal Defense Foundation files this brief *amicus curiae* in support of petitioner.

INTEREST OF THE *AMICUS CURIAE*

The interest in this petition of the Foundation as *amicus curiae* appears in its motion for leave to file this brief, *ante*.

SUMMARY OF ARGUMENT

For the last forty years, the federal district courts have traditionally provided a judicial forum for employees injured by their unions' actions in violation of the duty of fair representation. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). In order to assure that the employee is not deprived of effective remedies when the exclusive representative fails in its duties, this Court has long recognized federal court jurisdiction over claims alleging a breach of the union's duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 182-83 (1967). In addition, federal court jurisdiction over fair representation claims is not limited to cases in which the plaintiff alleges that his employer breached the collective bargaining agreement. *Communications Workers of America v. Beck*, ____ U. S. ____, 108 S. Ct. 2641 (1988); *Amalgamated Association of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971).

In *Vaca*, the Court recognized that administrative agencies charged with administering labor relations statutes have preeminent institutional goals which may, at times, result in subordinating the individual employee's remedies to remedies that either uphold the rights of employees making up a collective bargaining unit or protect a union's statutory prerogative to perform as exclusive representative. Accordingly, if the wronged employee were deprived of a judicial forum, the basic principles underlying the duty of fair representation would be entirely frustrated, and the constitutionality of the congressional grant of exclusive representation would be called into question. *Vaca*, 386 U.S. at 183.

In *Tunstall v. Bhd. of Locomotive Firemen*, 323 U.S. 210, 213 (1944), this Court specifically held that federal

court jurisdiction over employees' duty of fair representation claims was predicated upon 28 U.S.C. § 41(8), the statutory predecessor of 28 U.S.C. § 1337. No reason exists to depart from this well-established premise of duty of fair representation law. To depart from the holdings of *Vaca*, *Tunstall* and the host of other cases finding federal court jurisdiction for duty of fair representation claims would not only call into constitutional question the doctrine of "exclusivity"; it would also frustrate a preeminent concern of federal labor law, which is to protect the rights of the individual employee in the workplace.

With regard to petitioner's claim under the Labor-Management Reporting and Disclosure Act (LMRDA), the actions of respondent union should be actionable under the LMRDA. The LMRDA was the product of congressional concern over the widespread abuses of power by union leadership, *Finnegan v. Leu*, 456 U.S. 431 (1982). Such abuse is exactly what is present herein.

The overriding objective of the LMRDA is to "ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Id.* at 441. Allowing individuals like petitioner to be subjected to actions such as those he has been made to endure would render meaningless petitioner's rights under the LMRDA, and also the rights of other union members who may conclude that challenging the union's hierarchy is done at one's peril and loss of livelihood. *Id.* at 435-36. In passing the LMRDA, Congress recognized "that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal." *Steelworkers v. Sadlowski*, 457 U.S. 102, 112 (1982); *see also Sheet Metal Workers' International Ass'n v. Lynn*, ____ U.S. ____, 109 S. Ct. 639 (1989).

The use of hiring hall discrimination by union leadership in retaliation for an employee's failure to support the union hierarchy in a union election is precisely the kind of unlawful conduct that the LMRDA was enacted to address.

ARGUMENT

I. Forty years of precedent clearly shows that a union member's claim that his collective bargaining representative breached its duty of fair representation by engaging in discriminatory job referrals is properly brought in federal district court invoking the court's jurisdiction under 28 U.S.C. § 1337.

This Court has long recognized that the broad authority of the union as an exclusive bargaining agent must be accompanied by "a responsibility equal in scope to its authority, 'the responsibility of fair representation.'" *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976), *citing Humphrey v. Moore*, 375 U.S. 335, 342 (1964). The duty of fair representation stands as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *DelCostello v. Teamsters*, 462 U.S. 151, 164 n.14 (1983), *citing Vaca*, 386 U.S. at 182.

In order to assure that the employee is not deprived of effective remedies when the exclusive representation system breaks down, this Court has repeatedly recognized that federal district court jurisdiction over duty of fair representation cases is essential. *DelCostello*, 462 U.S. at 164; *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 47-49 & n.12 (1979); *Glover v. St. Louis-San*

Francisco Ry. Co., 393 U.S. 324, 328-29 (1969); *Vaca*, 386 U.S. at 182-83; *Czosek v. O'Mara*, 397 U.S. 25 (1970).

One of the cornerstones of the private sector labor law structure is the union's duty of fair representation. The Court has recognized that, "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca*, 386 U.S. at 182. "In vesting the representatives of the majority with this broad power Congress did not, of course, authorize a tyranny of the majority over minority interests." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 64 (1975); *see also DelCostello*, 462 U.S. at 164 n.14; *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967). Consequently, the Court has fashioned the duty of fair representation to counterbalance Congress' grant of exclusive representation power to unions. *Vaca*, 386 U.S. at 177; *Humphrey*, 375 U.S. at 342; *Steele*, 323 U.S. at 202-03.

Essential to the duty of fair representation is the injured employee's unconditional ability to seek redress in the courts. *Vaca*, 386 U.S. at 182. This Court in *Vaca* underscored the significance of the special concerns of the individual employee in a duty of fair representation case, and held that these interests compelled *judicial*, as opposed to merely administrative, review:

> *[T]he unique interests served by the duty of fair representation doctrine have a profound effect, in our opinion, on the applicability of the pre-emption rule to this class of cases.* . . . The collective bar-

> gaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. This Court recognized in *Steele* that the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. Since that landmark decision, *the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.*

Id. at 181-82 (citations omitted) (emphasis added).

The Court further acknowledged that the NLRB, as an administrative agency, is not particularly well structured to remedy *individual* duty of fair representation injuries. Unlike a trial court, redress of individual grievances is not the primary purpose of administrative agencies such as the NLRB. *Id.* at 182 n.8. *Vaca* recognized that the NLRB's administrative focus in considering an unfair labor practice case where the duty of fair representation is involved does not specifically concern the wrong done to the employee.

> The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies. Thus, the General Counsel will refuse to bring complaints on behalf of injured employees where the injury complained of is "insubstantial."

Id. (citations omitted).

Considering the necessarily limited institutional role of the NLRB, together with the NLRB General Counsel's unreviewable discretion to issue unfair labor practice complaints, this Court in *Vaca* acknowledged that the available administrative remedies were often inadequate in duty of fair representation cases. The Court was concerned that the limited administrative focus of the NLRB might lead to a group of employees never having their complaints adequately redressed. This concern led directly to the enunciation in *Vaca* of the right to have these issues determined by a court, not the NLRB. Only in a court, where the focus is on the wrongs done to the individual employee before it, would the harm done to the employee be adequately and completely remedied. As Justice White emphasized in *Vaca*:

> The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.

Id. at 182-83.

Even though the union's actions in question might also constitute an unfair labor practice which could be heard by the NLRB, the Court's recognition of the potential inadequacy of the administrative remedy for individual employees led to the holding that the courts must provide a forum for individual redress. *Id.* at 188. As the Court has held, where duty of fair representation cases are involved, the right of the individual employee to be made whole is "[o]f paramount importance," *Bowen*, 459 U.S. at 222; *cf. Foust*, 442 U.S. at 49; *Steele*, 323 U.S. at

206-07. This is a concept which necessitates a judicial, not an administrative, forum.

This Court should not depart from the sound justification for providing a federal forum for an employee who has had his rights violated by a union statutorily charged with fairly and nondiscriminatorily representing his bargaining unit. When a union abuses the privilege of administering a job referral program, the exclusive representation process (which is the consequence of a union's Section 9 status) breaks down. Permitting an individual employee to seek *judicial* redress of the union's abuse of its congressionally created status was specifically what this Court intended to accomplish in *Vaca* and *Beck*. In the context of the instant case, this would mean that the petitioner must be found to have the right to pursue his federal court action to determine whether the union, exercising its *exclusive* right to represent all bargaining unit members, represented him fairly in its dealings with the employer.

This is *precisely* the scenario about which this Court was so concerned in *Vaca*. Surely a comprehensive system of federal labor relations cannot ask the federal employee to surrender his individual rights to a union, but then strip him of the ability to obtain an effective remedy when the union abdicates its responsibilities. The court is the only forum where the individual employee can be assured that the harm done to him by the union will be unconditionally and adequately redressed.

II. This Court has recognized the traditional basis for jurisdiction over "hybrid" duty of fair representation claims under 28 U.S.C. § 1337 because those claims "arise under" the congressional grant of authority for unions to act as exclusive representatives under § 9(a) of the NLRA.

This Court has recognized: (1) that jurisdiction over duty of fair representation claims is implied from the grant of exclusive representation status, *Vaca*, *supra*; (2) that jurisdiction exists over such claims "arising under" the NLRA; and (3) that jurisdiction exists over such claims, regardless of whether they are coupled with a § 301 "hybrid" claim against an employer. *Beck*, *supra*. Under these familiar principles, district court jurisdiction over duty of fair representation claims in the private sector is clearly appropriate, because these claims "arise under" the congressional grant of exclusive representation. *See* 28 U.S.C. § 1331.

The duty of fair representation did not find its genesis in any explicit statute. In private sector labor relations, the duty has been judicially fashioned by this Court from the National Labor Relations Act. *DelCostello*, 462 U.S. at 164.

In *Tunstall*, 323 U.S. at 213, a companion case to *Steele*, *supra*, this Court specifically held that federal court jurisdiction over employees' duty of fair representation claims was predicated upon 28 U.S.C. § 41(8), the statutory predecessor of 28 U.S.C. § 1337.[1]

Since *Steele* and *Tunstall*, this Court has repeatedly recognized that under the NLRA, many private sector

[1] 28 U.S.C. § 1337 is the commerce counterpart of 28 U.S.C. § 1331, the "general federal question jurisdiction" statute. It is generally recognized that § 1337 is merely the more specific of these two jurisdictional grants. *See* 13B Wright & Miller, *Federal Practice & Procedure*, § 3574 (1984); *Gorski v. Local Union 134, IBEW*, 636 F. Supp. 1174, 1183 n.14 (N.D. Ill. 1986); *Beriault v. Local 40, Super Cargoes & Checkers of I.L. & W. U.*, 501 F.2d 258, 264-65 (9th Cir. 1974).

duty of fair representation suits comprise two distinct causes of action: one against the employer for breach of contract under § 301, and the other against the union for breach of the duty of fair representation, with jurisdiction impliedly emanating from the congressional grant of exclusive representation contained in § 9(a) of the NLRA. *DelCostello*, 462 U.S. at 164 n.14. *See also Bowen v. United States Postal Service*, 459 U.S. 212 (1983). (These combined claims have been referred to as "hybrid § 301/fair representation" claims.) *DelCostello*, teaches that the true jurisdictional bases for the union's portion of the "hybrid" duty of fair representation claim are 28 U.S.C. §§ 1331 and 1337, because those claims "arise under" the congressional grant of exclusive representation, § 9(a) of the NLRA. *See* Boyce & Turner, *Fair Representation, the NLRB and the Courts* 123-27 (No. 18, Labor Relations and Public Policy Series, University of Pennsylvania Wharton School, Industrial Research Unit, 1984).

In addition to "hybrid" § 301/fair representation claims, employees in the private sector have successfully brought duty of fair representation actions against their unions for a wide array of arbitrary, discriminatory and hostile conduct which was *not* specifically related to any employer breach of contract. *E.g.*, *Beck*, 108 S. Ct. 2641 (union uses nonmembers' agency fees for political activities); *Anderson v. United Paperworkers*, 641 F.2d 574 (8th Cir. 1981) (union misrepresentation regarding contract ratification issue); *Bowman v. Tennessee Valley Authority*, 744 F.2d 1207 (6th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Many lower courts have held that the proper jurisdictional bases for these types of "bare" duty of fair representation claims are 28 U.S.C. §§ 1331

and 1337. *See Retana v. Apartment, Motel, Hotel & Elevator Operators, Local 14*, 453 F.2d 1018 (9th Cir. 1972); *Smith v. Local 25, Sheet Metal Workers*, 500 F.2d 741 (5th Cir. 1974); *Chavez v. United Food & Commercial Workers International Union*, 779 F.2d 1353 (8th Cir. 1985); *Anderson*, 641 F.2d at 576; *Gorski*, 636 F. Supp. at 1182-83; *see also* Boyce & Turner, *Fair Representation, the NLRB, and the Courts* 123-27.

With this wide precedential base supporting the conclusion that federal courts have jurisdiction over "non-hybrid" duty of fair representation claims under 28 U.S.C. § 1337, it is respectfully submitted that the court of appeals erred when it concluded that there was no "federal question" jurisdiction for the district court to hear petitioner's complaint regarding the union's discriminatory operation of a hiring hall.

III. The failure of a union to refer one of its members for employment because of his participation as an adversary in a union election is "discipline" that can be redressed through the Labor-Management Reporting and Disclosure Act.

In section 101(a)(5) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401 *et seq.*, fines, suspensions and expulsions are specifically enumerated as the types of discipline that require compliance with statutory safeguards. The section also requires compliance when a union member is "otherwise disciplined" which has generally required there to be some finding that union action has actually resulted in a detriment to the union member. As one court has put it, the purpose of the section is "to provide procedural safeguards to union members when an action taken against

them would result in the loss of some valuable membership right, monetary or otherwise," *Pittman v. United Bhd. of Carpenters*, 251 F. Supp. 323, 324 (M.D. Fla. 1966).

It is clear that it was Congress' intent in the LMRDA to allow the invocation of Section 101(a)(5) whenever a union seeks to limit a member's employment opportunities. As this Court has stated, such an inquiry would not determine the validity of a union's substantive rule but instead would allow a determination as to whether Section 101(a)(5)'s requirements have been complied with. *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 245 (1971).

Respondent may well argue that the type of discipline directed at petitioner herein in no way affects his membership rights because hiring hall referrals are available to nonunion members. Such an argument is disingenuous and belies the realities of the workplace.

Union members have certain rights and prerogatives in the hiring hall that separate them from nonmembers. One of those rights includes the ability to elect officers of the union. To conclude that Congress protected the rights of members to participate in the electoral process by expressing their views, yet not protect their right to express their views without being in jeopardy of losing their ability to earn a living would put the statute at odds with its own purposes. Accordingly, any union action which penalizes petitioner in a way which separates him from comparable members in good standing would constitute discipline within the meaning of the LMRDA. *See Miller v. Holden*, 535 F.2d 912, 915 (5th Cir. 1976). When union discrimination in the operation

of a hiring hall is coupled with petitioner's action opposing the union hierarchy in a recent election, the test for application of the LMRDA "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections" is met. *Finnegan v. Leu*, 456 U.S. at 441.

The overriding objective of the LMRDA is to "ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Id.* Allowing individuals like petitioner to be subjected to actions such as those he has been made to endure would render meaningless petitioner's rights under the LMRDA and also the rights of other union members who may conclude that challenging the union's hierarchy is done at one's peril and loss of livelihood. *Finnegan v. Leu*, 456 U.S. at 435-36. In passing the LMRDA, Congress recognized "that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal." *Steelworkers v. Sadlowski*, 457 U.S. at 112; *see also Sheet Metal Workers v. Lynn, supra.*

The actions of respondent union should be held to be actionable under the LMRDA. The LMRDA was the product of congressional concern over the widespread abuses of power by union leadership. *See generally Finnegan v. Leu, supra.*

CONCLUSION

For the above stated reasons, as well as those contained in petitioner's brief, the decision below should be reversed.

Respectfully submitted,

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